THE RULE OF LAW, JUDICIAL SELF-RERAINT, AND UNANSWERED QUESTIONS: DECISIONS OF THE UNITED STATES SUPREME COURT’S 2003-2004 TERM

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I. INTRODUCTION

A. THE STATISTICS

The statistics of this term were familiar, nearly exactly reflecting the statistics of recent previous terms. The Court decided seventy-three cases with full opinions—two more than the year before.¹ There were eighteen cases decided by five person majorities but, because of peculiar splits in some cases, there were arguably twenty-one 5-4 or 5-3 decisions, comparable to the twenty-one two years ago and the fourteen last year.²

This bland recitation of the term’s statistics does not begin to describe the unusual divisions and strange combinations among the Justices this term. What themes emerge from this peculiar Court term?

B. THE THEMES

First, this Supreme Court term is memorable for its assertion of the rule of law in the context of three terrorism decisions that rejected the Bush administration’s arguments that judges have no role to play in supervising the President’s conduct of the War on Terrorism.³ The Court affirmed adherence to due process in a time of national emergency.⁴ Even the gravest national security concerns could not justify the claim of the President that he was entitled to act without any meaningful oversight by the courts.⁵ As Justice O’Connor wrote for seven of her colleagues, “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”⁶ In challenging times, O’Connor wrote, “[w]e must preserve our commitment at home to the principles for which we fight abroad.”⁷

It is especially noteworthy that only Justice Thomas endorsed the arguments of President Bush.⁸ Even a Bush loyalist such as Justice Scalia wrote in Hamdi, “[t]he very core of liberty . . . has been

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5. Rasul, 124 S. Ct. at 2692-93.
6. Hamdi, 124 S. Ct. at 2650.
7. Id. at 2648.
8. Id. at 2682-85 (Thomas, J., dissenting).
freedom from indefinite imprisonment at the will of the executive.” Further, at oral argument in *Rumsfeld v. Padilla*, Scalia responded to the administration’s argument that judges should not interfere with, or review the President’s conduct in the War on Terrorism by saying that the President would be asking for more power than George Washington had. In the three cases arising from the terrorism detainees, eight members of the Court refused to grant the executive that power.

While these noble and historic pronouncements symbolize a Court term devoted in part to reaffirmation of the rule of law in the context of judicial checks on the exercise of executive power, what is also significant about this term is the number of unresolved issues and unanswered questions. More than in any recent term of the Court, this year has resulted in decisions that create large numbers of unresolved issues—some of momentous practical impact on the administration of justice in America. In many ways, despite the array of fascinating and fundamental legal issues that the Court confronted, judicial self-restraint, or what one commentator has called judicial “minimalism,” defined the term.

There were several reasons for their failure to resolve important issues or to address the obvious ramifications of their opinions. Sometimes this was because the Court did not choose to reach the merits of a particular claim by dismissing cases on jurisdictional grounds, as was done in the Pledge of Allegiance case and one of the terrorism cases.

In other cases, the Court issued a narrow holding, limiting itself strictly to the issue before it, as in holding that the Guantanamo detainees have a right to access federal courts but not discussing what form of hearing they are entitled to have. As my former colleague, Professor Erwin Chemerinsky of Duke Law School has written:

In some cases, the Court left open important questions by issuing only a narrow holding. For example, in *Tennessee v. Lane*, the Court said that people with disabilities may sue state governments under Title II of the Americans with Disabilities Act when the fundamental right of access to the courts is implicated, but the Court did not address what other suits may be brought against states under this statute. Also, in *Sosa v. Alvarez-Machain*, the Court said that individuals may sue under the Alien Tort Claims Act for torts in violation of the law of nations, but the Court left uncertain when such suits will be allowed.

In some cases, the Court left key questions unresolved because there was no majority opinion. For instance, in *Vieth v. Jubelirer*, a plurality concluded that challenges to partisan gerrymandering is a non-justiciable political question, but five Justices left open the possibility that such challenges may be heard in the future. Finally, the decisions that most changed the law—*Crawford v. Washington* in limiting hearsay that can be used in criminal trials, and *Blakely v. Washington* in expanding the role for the jury in criminal cases—raise enormously important unanswered questions that will confront federal and state courts every day.

I cannot think of any recent Supreme Court Term where so much was left undecided. All of these issues now will be faced by the state courts and the lower federal courts. Ultimately, almost all of these unanswered questions may return to the Supreme Court in coming years for clarification.
As Chemerinsky points out, among the best examples of unresolved issues arise in the criminal cases *Crawford v. Washington*\(^{18}\) and *Blakely v. Washington*\(^{19}\) where the Court refused to discuss the obvious impact of their decisions.\(^{20}\) In *Crawford*, limiting the use of out-of-court statements for a testimonial purpose, the Court left for another day a definition of what is testimonial.\(^{21}\) Although the majority opinion in *Blakely* acknowledged the potential dramatic impact of its decision on the federal sentencing guidelines, the Court refused to comment because the federal guidelines were not involved in the *Blakely* case.\(^{22}\) The confusion among the federal circuits as to the impact of *Blakely* on the federal guidelines has led the Supreme Court to accept two cases for argument early next term to resolve that issue.\(^{23}\)

Third, it is clear that, in stark contrast to previous years, the Chief Justice played little role in the direction of the Court this term.\(^{24}\) Rehnquist, who usually writes a large number of opinions when he is in the majority, authored only two opinions this year.\(^{25}\) Justice Stevens, the leading dissenter in past years, wrote the greatest number of majority opinions, leading one commentator to conclude, “[i]n many ways this was much more the Stevens Court than the Rehnquist Court.”\(^{26}\)

Linda Greenhouse of the New York Times entitled her yearly summary of the Court’s term, “The Year Rehnquist May Have Lost His Court.”\(^{27}\) Only a few years ago, it looked like this was the Rehnquist Court—a conservative Chief Justice leading a conservative Court in a conservative political era.\(^{28}\) Last year, in *Four Cases and an Interesting Supporting Cast*, one of my analytical themes was that the Court could still surprise, with the Chief Justice in the ascendant and Justice Scalia largely marginalized.\(^{29}\) This term it is arguable that Scalia is in the ascendant while Rehnquist has been marginalized.\(^{30}\) While Scalia often spoke for the Court on important issues or wrote memorable dissents this year, the Chief Justice wrote only two majority opinions and played little role in shaping the Court’s position in most of the significant decisions of the term.\(^{31}\) As Ms. Greenhouse has written:

> It is too soon to say for sure, but it is possible that the 2003-4 term may go down in history as the one when Chief Justice William H. Rehnquist lost his court.

The cases decided in the term’s closing days on the rights of the detainees labeled “enemy combatants” by the Bush administration provided striking evidence for this appraisal. The court ruled that foreigners imprisoned at Guantanamo Bay, Cuba, as well as American citizens held in the United States are entitled to contest their classification before an impartial judge.

The surprise lay not in the outcome: it was scarcely a great shock, except perhaps to the administration, that a court preoccupied in recent years with preserving judicial authority would reject the bold claim of unreviewable executive power at the core of the administration’s legal arguments.

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\(^{19}\) 124 S. Ct. 2531 (2004).
\(^{20}\) Chemerinsky, *supra* n. 17, at 324.
\(^{21}\) 124 S. Ct. at 1354.
\(^{22}\) 124 S. Ct. at 2548-49.
\(^{24}\) See Greenhouse, *supra* n. 2, at ¶¶ 2-12, 18-20 (discussing the limited role Rehnquist played in this year’s term).
\(^{25}\) Id.
\(^{26}\) Chemerinsky, *supra* n. 17, at 323.
\(^{27}\) Greenhouse, *supra* n. 2.
\(^{28}\) Whitebread, *supra* n.1, at 695.
\(^{29}\) Id. at 697.
\(^{30}\) See generally Greenhouse, *supra* n. 2 (detailing the trends that emerged this term).
\(^{31}\) Id.
Rather, what was most unexpected about the outcome of the cases was the invisibility of Chief Justice Rehnquist.

It is a remarkable development. Since his promotion to chief justice 18 years ago, his tenure has been notable for the sure hand with which he has led the court, marshaling fractious colleagues not only to advance his own agenda but also to protect the court’s institutional prerogatives.

Four years ago, for example, the court reviewed a law by which Congress had purported to overrule the Miranda decision, a precedent Chief Justice Rehnquist disliked and had criticized for years. But in the face of Congress’s defiance, he wrote a cryptic opinion for a 7-to-2 majority that said no more than necessary about Miranda itself but found common ground in making clear that it was the court, not Congress, that has the last word on what the Constitution means.

This year, there was every reason to suppose the chief justice would want to shape the court’s response to the war on terrorism. His 1998 book on the history of civil liberties in wartime reflected his extensive knowledge and evident fascination with the subject by which the term, if not his entire tenure, was likely to be known. If there was a message to be delivered from one branch of government to another, Chief Justice Rehnquist figured to be the one to deliver it.

Yet the Guantanamo case found him silently joining Justice Antonin Scalia’s dissenting opinion as Justice John Paul Stevens explained for the 6-to-3 majority why the federal courts have jurisdiction to review the status of the hundreds of foreigners detained there.

In the case of Yaser Esam Hamdi, the American-born Saudi taken from the battlefield in Afghanistan and held since 2002 in a military prison, Chief Justice Rehnquist was among the eight justices who found the open-ended detention improper for either constitutional or statutory reasons. But his was not among the several voices with which the court spoke. He was a silent member—perhaps even a late-arriving one—of Justice Sandra Day O’Connor’s plurality opinion.32

Fourth, if the Chief Justice had no major role in the Court’s decisions, the central and decisive position of Justice O’Connor is once again very clear this year. She cast only five dissenting votes in the entire term, fewer than any other justice and was in the majority in thirteen of the eighteen most hotly contested cases.33 Although she usually sided with her conservative colleagues Scalia, Thomas, Rehnquist, and Kennedy, the percentage of 5-4 rulings in which she joined the four more liberal members—Breyer, Ginsburg, Stevens, and Souter—has been increasing during the past four years.34

Fifth, criminal cases dominated the term in contrast to past years, when civil cases held the spotlight. Not only were there a great many criminal cases, but as we have seen, two of these criminal decisions will have far-reaching effects. There were seven Fourth Amendment cases, of which the government won six.35 None of the Fourth Amendment cases makes a major change in the law, although all decide important questions concerning the police power to search.36

There were three Fifth Amendment cases about the Privilege Against Self-Incrimination.37 The defendant prevailed in only one.38 In what arguably will prove to be the most significant cases of the

32. Id. at ¶¶ 2-8.
33. Id.
36. Id.
38. Seibert, 124 S. Ct. at 2613.
term, *Crawford v. Washington*\(^\text{39}\) and *Blakely v. Washington*,\(^\text{40}\) the Court, relying on the Sixth Amendment rights to jury trial and to confront and cross-examine witnesses, issued opinions favorable to the defendant.\(^\text{41}\)

This term’s criminal cases indicate that the Supreme Court has effectively created a hierarchy among the provisions in the Bill of Rights for those accused of crime. Not all rights of criminal defendants are entitled to the same degree of scrutiny by the Supreme Court. The criterion on which the hierarchy is based appears to be how much impact the right in question has on what the Court sees as the ultimate mission of the criminal justice system, namely, convicting the guilty and letting the innocent go. In other words, the new hierarchy is based on the relative impact of the right on guilt determination at trial.

The trial-related rights such as the rights to jury trial, to counsel, and to confront and cross-examine witnesses are given top position in the Court’s rights hierarchy. In the middle stands the Fifth Amendment Privilege Against Self-Incrimination dividing between true voluntariness claims and *Miranda*-based claims. Both *Missouri v. Seibert*\(^\text{42}\) and *United States v. Patane*\(^\text{43}\) discuss and highlight this division.

Finally, the right at the bottom is the Fourth Amendment right which, when coupled with the remedy of exclusion, may have a negative impact on guilt determination. For this reason, search and seizure claims get shortest shrift before the present Court.

Sixth, this year, First Amendment cases took a back seat. There were significantly fewer First Amendment cases compared with prior years. In addition to the Campaign Finance case,\(^\text{44}\) there were only two First Amendment cases of note—one concerning religion and the other freedom of speech. In the Pledge of Allegiance case, the Court ducked the “under God” issue, deciding the case on narrow standing grounds.\(^\text{45}\) In *Locke v. Davey*, the Court ruled that states that subsidize college tuition for secular studies are not constitutionally required to give such scholarships to students preparing for the ministry.\(^\text{46}\)

The Court in *Ashcroft v. ACLU* again rejected Congress’s effort to curb child access to sexually explicit material on the internet.\(^\text{47}\) This was the only non-campaign finance related free speech case of the year.

Seventh, as to issues of federalism, all cases resulted in federal power trumping states’ rights. Ruling very narrowly, the Court held in *Tennessee v. Lane* that states could be sued under the *Americans with Disabilities Act* for failing to provide handicapped access to courthouses.\(^\text{48}\) Whether states can claim sovereign immunity as to other applications of the disability statute was not addressed and remains to be resolved in future cases.

The Court also held in *Tennessee Student Assistance Corp. v. Hood*, that state sovereign immunity is not implicated in a bankruptcy proceeding, where a petitioner must serve a summons and complaint on the State in order to obtain an undue hardship determination from the bankruptcy court for purposes of discharging his or her student loan.\(^\text{49}\)

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41. *Crawford*, 124 S. Ct. at 1374; *Blakely*, 124 S. Ct. at 2543.
42. 124 S. Ct. 2601 (2004).
47. 124 S. Ct. 2783, 2794 (2004).
In *Frew v. Hawkins*, the Court found state officials are not protected by Eleventh Amendment sovereign immunity with respect to a federal court’s enforcement of a consent decree. The states’ rights revolution of recent years then seemed in retreat this year.

Eighth, there were two major opinions concerning the political process and elections under the Constitution. In *McConnell v. Federal Election Commission*, the Court decisively upheld most key provisions of the *Bipartisan Campaign Finance Reform Act of 2002*. In *Vieth v. Jubelirer*, the Court left in total confusion the question of when, if ever, challenges to partisan political gerrymandering are justiciable in federal courts.

Finally, given the number of 5-4 decisions by the Court this term, and the extraordinarily large number of unresolved issues and unanswered questions left for future consideration by the Court, how these issues will be decided—and even whether some of this term’s decisions will remain good law—may well be determined by the outcome of the 2004 presidential election and who will get the opportunity to fill potential vacancies on the Court.

This Court has been together with the same membership for a modern record of ten years and convenes for an eleventh in October 2004. Of course, sooner or later, vacancies will occur. Who leaves the Court and who joins it could make a decisive difference in determining the impact, and even continuing validity, of this term’s most significant rulings.

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52. Id. at 707.